

## Restorative Justice Impact on Multinational Corporations?: A Response to Andrew Brady Spalding's Article

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In response to Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357 (2015).

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### I. INTRODUCTION

Over the past four decades the restorative justice movement has grown from very marginal and humble beginnings in Canada and the U.S. to what today is truly a social movement in the global community, with endorsements by the United Nations<sup>1</sup> and the European Council.<sup>2</sup> The core principles and practices that much of the modern day restorative justice field is grounded in—particularly peace building through dialogue, compensation to victimized individuals and communities, and accountability measures for offenders that lead to greater responsibility and reintegration—are deeply rooted in the wisdom and practices of many indigenous communities that go back centuries.<sup>3</sup>

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<sup>1</sup> Economic and Social Council Res. 2000/14 (July 27, 2000).

<sup>2</sup> COUNCIL OF EUR., COMM. OF MINISTERS, RECOMMENDATION NO. R (99) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING MEDIATION IN PENAL MATTERS (1999), <https://wcd.coe.int/ViewDoc.jsp?id=420059> [<https://perma.cc/UD7R-SX2L>].

<sup>3</sup> MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE 5 fig.1.1 (2010).

Corresponding to these aims are communication models that have been revived from community-based traditions, including circle processes and family group conferencing.

Before any European set foot on the American continent, the more than 500 tribal communities of Native Americans had many understandings and practices that parallel what today would be referred to as restorative justice, an understanding of crime as a wound within their community/tribe, not a violation of the state. Justice required some form of what today we would call accountability toward persons who were affected and particularly toward the entire tribe that is so dependent on group cohesion and harmony for survival. The notion of crime being a violation of the state, with individual victims and victimized communities receiving little if any attention, is an entirely European concept.<sup>4</sup> It is precisely because the core principles of restorative justice parallel the ancient wisdom of so many non-Western populations, particularly among the indigenous people of the world, that the restorative justice movement has gained increased support from numerous non-Western nations and indigenous people.

It is not surprising, therefore, that in today's global context, where interactions between nations can be deeply affected by white-collar crimes committed by multinational corporations and their host-country partners, that restorative models would resonate well with non-Western stakeholders. At the same time, it appears to be Western innovators who are the ones introducing restorative processes worldwide for crimes and conflicts at ever higher and institutionally-complex levels. Andrew Spalding,<sup>5</sup> in his article *Restorative Justice for Multinational Corporations*, makes a convincing case that restorative practices can be adapted for extraterritorial white-collar crime and can thereby bring about more constructive results than current fine-based punishments. A fair portion of his article demonstrates how conventional models of anti-bribery enforcement that rely on deterrence theory frequently give rise to greater corruption and more bribery.

By narrowing the focus on punishing the offending party and ignoring the conditions and relational networks in the host country, traditional responses to white-collar crime abroad can actually reinforce the very conditions that gave rise to the criminal conduct in question and proliferate a greater ethos of bribery. The consequences, writes Spalding, are numerous: American capital typically divests from the country, competitive firms that disregard anti-bribery codes enter into the vacuum (i.e. China), national firms scramble for economic stability, and victimized parties and communities in the host country receive no reparations.<sup>6</sup>

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<sup>4</sup> *Id.* at 4–5.

<sup>5</sup> Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 357 (2015).

<sup>6</sup> *Id.* at 370.

With bold imagination, Spalding sees that a restorative model not only helps to prevent the negative fallout stemming from conventional white-collar enforcement, but it promises a way to bring about actual reforms within the host country. Without using the term, Spalding has presented a higher “transformative justice” scenario for addressing corporate-level bribery in that the reparation model itself includes elements that correct the systemic causes of the problem. The equivalent in the regular restorative justice realm would be as follows: a chronic male offender from an inner city who has stacked up felonies for burglary and drug dealing is presented with a new set of obligations. Rather than isolating him for 20 years from his community (which arguably brings little good for him or the community), he is required to invest his time in reversing the very social conditions in his community that made stealing and drug dealing justifiable activities.

Not only would he be doing community service work; he would be creating projects that provide meaningful jobs for young adults. Not only would he be doing group recovery work; he would be assisting with programs that educate youth against drugs and alcohol. In brief, he would not simply be restoring his community back to the equity that existed before his crimes; he would be transforming his community toward a higher vision that reduces the very possibility of crime in that social setting. It is this holistic vision that Spalding has in mind when he imagines how a multinational corporation can take the fullest responsibility for its negative actions. One might fairly ask if this is too idealistic or too unrealistic for today’s international scene.

“What extraterritorial criminal enforcement needs, then, is a foundational theory of punishment that looks beyond the potential violators within its jurisdiction and engages with the broader social and legal environment in which the crime occurred.”<sup>7</sup> Again, Spalding is hybridizing a restorative approach (that seeks full restoration for offenders, victims and communities) with a transformative approach (that seeks systemic change at the level of root causes and sustainable relationships between players in conflict). If he further develops his applications for resolving corporate crime, it will be helpful for him to integrate the frameworks of John Paul Lederach which effectively address the foundational and patterned epicenters of problems and not merely the symptomatic episodes.<sup>8</sup>

Spalding’s vision, though, is not without precedence within the Western context. He expounds on American sources that can authorize an extended use of “supplemental sentencing” in the area of anti-bribery enforcement: the US Constitutional law and Sentencing Guidelines that allow for monetary penalties to be used for remedial measures, and Department of Justice practices that invite rehabilitation and reparation.<sup>9</sup> Moreover, the seeds of restorative justice

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<sup>7</sup> *Id.* at 383.

<sup>8</sup> JOHN PAUL LEDERACH, *THE LITTLE BOOK OF CONFLICT TRANSFORMATION* 28–39 (2003).

<sup>9</sup> Spalding, *supra* note 5, at 392–95.

that are nascent to these authorizing areas have actually been put to use by the United States government in the past two decades. Spalding notes how the prosecution of domestic white-collar environmental crimes has included the shifting of energies from paying fines to the government toward making meaningful compensations and reparations to impacted communities.<sup>10</sup> With these precedents established, Spalding sets forth a robust scenario of applying restorative principles to a hypothetical case involving multinational sentencing for bribery in a host country.<sup>11</sup>

Before engaging Spalding's proposal to use restorative principles and practices in resolving extraterritorial corporate crime, it will be helpful to review the many ways in which restorative justice has increasingly been applied to areas far beyond the traditional context of bringing offenders and victims together for resolving crimes. Within the past three decades, not only has restorative justice expanded throughout all levels of the justice system, but it has found applications for situations of community problem-solving and transitional justice on the international scene. This review will certainly show Spalding's vision to be in full alignment with the central elements of a restorative framework, yet at the same time it will be shown that his model could be strengthened with a greater use of dialogue between parties most involved in corporate crime.

## II. THE EXPANSION OF RESTORATIVE JUSTICE

While the restorative justice movement in its more contemporary American or European expression began with a focus on minor crimes committed particularly by juveniles (but also adults on a smaller scale), today the field has grown far beyond responses to just minor crimes involved in the justice system. Some of the most exciting and flourishing developments with larger potential impact have focused on restorative school discipline policies and practices, including new responses to bullying.<sup>12</sup> Doing restorative work in schools prior to the use of criminal charges has shown how intervention strategies are equivocal to prevention strategies.

At the other end of the spectrum, a slow but growing trend that started in the mid-1980s saw the rise of requests from victims and families of violent crime to meet with their offenders in prison settings. In 1991, Texas became the first state to provide the opportunity for victim offender dialogue in severely violent cases, including murder, if initiated by surviving victims or family members and if the offender (nearly always in prison) truly volunteered to participate in such a meeting, after lengthy preparation of both. Today there are twenty-three states with similar protocol to serve the needs of victims of violence who express the need for and initiate the victim offender dialogue

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<sup>10</sup> *Id.* at 388.

<sup>11</sup> *Id.* at 402–07.

<sup>12</sup> UMBREIT & ARMOUR, *supra* note 3, at ix–x.

process in extremely violent cases. Research has found the restorative justice process of victim offender dialogue in violent cases to have an exceptionally positive impact on participating victims as well as the prisoners.<sup>13</sup>

Other realms of expanding restorative practices include faith communities, neighborhood groups, workplace disputes, and various alternatives to civil-suit litigation. Internationally, restorative models have been tailor-made in transitional justice settings to address human rights abuses. Ireland, Rwanda, and Israel/Palestine have all benefitted from various dialogue processes that have combined accountability with healing. The most well-known macro-expression of restorative justice is seen in the Truth and Reconciliation Commission (TRC) hearings in South Africa, chaired by Bishop Desmond Tutu in the mid to late-1990s. He has clearly stated that the TRC was grounded in restorative justice principles and the more ancient Zulu tradition of *ubuntu*,<sup>14</sup> a vibrant concept of interdependency which can be translated as “my well-being is based on everyone’s well-being.” In summary of this review of expanding applications, it is worth noting that a common feature in nearly all of the examples mentioned is the use of facilitated dialogue between parties most involved or affected.

### III. THE LIMITS OF EXPANSION AND SPALDING’S PROPOSAL

The expansion of restorative justice into areas far beyond its origin in juvenile courts is encouraging. Nevertheless, it has yet to have a significant impact on one of the largest sources of crime on the global scene, namely, white-collar sanctioned bribery among multinational corporations. The magnitude of such economic crime not only impacts the stability of economic interactions, but it can also ruin the lives and reputations of people, let alone trigger needless violence. And as it was noted above, not only does economic crime set negative ripple effects in motion, but the very effort to punish corporate crime without addressing the root causes can be counterproductive, causing greater corruption.

Our nation’s expensive criminal justice system and corrections has focused nearly exclusively on crimes committed by those on the street rather than the far more damaging crimes committed by those in corporate suites. This is precisely why Spalding’s article on restorative justice for multinational corporations has tremendous relevance and offers a challenge to the larger field of economic crime. For those researchers and practitioners who have been active in the field of restorative justice over the years, Spalding’s article offers an entirely new vision, backed up by thorough research, on how restorative justice principles and practices can be applied on a macro-level in a setting of huge economic harm that is rarely addressed with effectiveness.

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<sup>13</sup> MARK S. UMBREIT ET AL., *FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* 304–06, 305 tbls.11.4 & 11.5 (2003).

<sup>14</sup> DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 31–32 (1999).

Spalding effectively critiques the dominant deterrence approach to criminal justice in the context of multinational corporations. He very clearly states that the deterrence approach cannot even reach competitor firms from jurisdictions that do not enforce the extraterritorial prohibition. It does not even attempt to reach the host country from where the perpetrator operates. "It merely punishes the wrongdoer, with the aim of specifically deterring the wrongdoer's recidivism and generally deterring others through fear of punishment."<sup>15</sup> But since enforcement of our statutes is based on the expectation that they will reduce crime in the countries in which we do business, even though we have no jurisdiction in those countries, the theory of deterrence has little impact.

In fact, evidence has been found that patterns of bribery, even after criminal charges and convictions have fallen upon the offending corporation, can reinforce additional patterns of bribery among the non-Western players situated in the host nation.<sup>16</sup> As a corrective to this conventional mode of resolving economic crime, Spalding argues that a theory of criminal justice that looks beyond the potential individual offender's cost-benefit analysis is needed, specifically, one that moves from a one-dimensional focus on the offender to a three-dimensional focus on the offender, the individuals and business community that were victimized, and the social environment/community that allowed the offense to happen.<sup>17</sup>

Spalding provides a compelling analysis of how the restorative justice approach is already being applied in federal white-collar environmental enforcement in the form of "supplemental sentences" even though the language of restorative justice principles plays out in the background, perhaps never specifically being mentioned.<sup>18</sup> He then provides an analysis of how the U.S. Constitution provides the framework for supplemental sentences and has even led to specific guidelines for supplemental sentences that are restorative in nature and readily transferable to extraterritorial white-collar enforcement involving multinational corporations. Spalding goes on to identify how restorative supplemental sentences are already authorized and encouraged under federal sentencing law, again with the specific theory and principles of restorative justice playing out in the background. The primary thesis of Spalding's article is "to describe[ ] the transference of existing domestic white-collar enforcement procedures to extraterritorial enforcement" involving restorative responses to law violation by multinational corporations responsible for massive economic harm to individuals, communities, and nations.<sup>19</sup>

As one who has been involved in the restorative justice movement from its inception in the mid-1970s as a practitioner and later as a researcher, I can say with a good deal of confidence that many in the field would claim Spalding's

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<sup>15</sup> Spalding, *supra* note 5, at 383.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 385.

<sup>18</sup> *Id.* at 388.

<sup>19</sup> *Id.* at 384.

thesis is a major stretch, especially since restorative language or categories are not explicitly used in the examples he provides. They may say, for example, that despite the ways in which true restorative justice responses may overlap with the processes used in resolving high-level white-collar crime, these processes, in the main, oversimplify the real justice issues at hand. Such respondents would argue that restorative justice is about people, communities, and relationships, not multinational corporations. The essence of restorative justice is grounded in humanizing the justice process, responding to the harm caused upon individuals and communities, and empowering the key stakeholders (victims, offenders, and the community) to be actively involved (usually through some form of dialogue) in the process of acknowledging the harm, hearing the narratives of all those affected by the crime, including the offender, developing a realistic plan to repair the harm, and strengthening community safety and engagement. Frankly, in my earlier years, I would have taken this type of position. Today, however, I now see more clearly how Spalding's vision is a viable and creative approach to apply a long-overdue restorative framework to multinational infractions.

#### IV. ADDING DIALOGUE TO *RESTORATIVE JUSTICE FOR MULTINATIONAL CORPORATIONS*

While Spalding's hypothetical proposal does well to consider how an offending party invests in meaningful reparations to impacted parties and communities, so much so, in fact, that the remedial projects promote significant prevention elements to thwart future corruption,<sup>20</sup> the model lacks a central component that gives restorative processes their primary power, namely, empowered dialogue between parties. Without dialogue, there generally is no mutual understanding, no new learning, no empathy building, all of which, in a restorative mindset, generates the internal motivation for offenders to make positive amends and not repeat future offenses. Spalding's model still requires an enforced sentence, albeit a restorative sentence, overseen by a judge and other legal professionals. It is one thing to require offending parties to do good things to make things right; it is quite another to empower parties to have the necessary conversations that in turn lead them to choose themselves to make things right. This gets to the heart of why restorative justice has become effective: the empowerment of parties through voluntarily chosen processes.

To be fair to Spalding, however, he is dealing with large corporations that are accustomed to being held to external standards, and he insightfully places the process at the point of a "deferred prosecution agreement" that splits the difference between the front and back end hearings of normal court processes, thus empowering parties to have more influence in their alternative sentencing. Also, Spalding's scenario is not without forums of communication. He envisions the corporation writing a "comprehensive report" that is printed in the

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<sup>20</sup> *Id.* at 402–07.

host country, which serves as a “public confession” of causing harms as well as a platform for describing the economic complexities surrounding bribery conduct.<sup>21</sup>

His model continues with the prospect of trainings to reduce host-country bribery and stimulate reform—again, the transformative emphasis. Notably, he speaks of “[p]erpetrator and victim thus hear each other’s narratives, seeking understanding and reconciliation.”<sup>22</sup> This of course is vital for any restorative process, yet more framing will need to be added to this within the context of court-ordered sentencing. Questions remain: who facilitates these discussions? How are they structured? Are agreements generated by the parties? And even the status of victims needs more clarification. Are the victims the same party who accepted bribes? Do they wear two hats: victim and co-offender? These questions certainly do not diminish the profound application of restorative principles to economic crime; they simply invite further work in the context of actual practice.

## V. CONCLUSION

In closing, understanding Spalding’s thesis with its focus on restorative justice for multinational corporations requires those who have been active in the field to truly think outside the box, to be open to the potential and partial existing reality of applying a restorative approach to macro-level white collar crimes in which those responsible are rarely dealt with in a manner that fosters true accountability and healing. Granted, Spalding’s argument that restorative justice practices are currently being applied in federal environmental enforcement and that the U.S. constitution already provides a framework for restorative justice through “supplemental sentences” does sound like a stretch upon first reading. Yet, Spalding does provide a persuasive and well-documented argument, one that has certainly broadened my own vision of the potential impact of restorative justice on a macro-level in the coming years.

Whether or not restorative justice can be fully and realistically implemented in the context of all white-collar crime and specifically with multinational corporations is yet to be seen. Yet, Spalding presents a strong case for the potential benefits that restorative justice can have in an area of crime and social harm that is massive and ineffectively addressed. As this model gets further worked out in practice, it will be necessary to give greater attention to the place of dialogue between empowered parties. Reaching economic restoration must be integrated with reaching some degree of relational restoration, even if it is between social groups. In this light, restorative encounter will be balanced with Spalding’s emphasis on restorative reintegration. Spalding’s vision can be summed up by two questions that he raises: “Can multinational corporations, who have committed crimes, heal social wounds? Can corporate defense

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<sup>21</sup> Spalding, *supra* note 5, at 404.

<sup>22</sup> *Id.* at 406.



counsel, and federal prosecutors, be peacemakers?”<sup>23</sup> “[T]he answer is yes,” he says,<sup>24</sup> and to that we add our own “yes!”

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<sup>23</sup> *Id.* at 385.

<sup>24</sup> *Id.*